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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 695

JOE ROBERT COLLIER, PETITIONER

v.

UNITED STATES OF AMERICA

MOTION TO VACATE THE ORDER OF THE COURT OF APPEALS AND TO REMAND THE CAUSE FOR FURTHER CONSIDERATION

On March 24, 1965, a jury in the United States District Court for the Western District of Kentucky found petitioner guilty of violating 18 U.S.C. 2421 (R. 7), and the court entered a formal judgment of conviction on the same day (R. 7–8). On April 2, petitioner, through new counsel, filed a motion for a new trial (R. 11–12), which was untimely under Rule 33, Fed. R. Crim. P. This motion, it appears, was coupled with a motion for bail "pending a final determination, an appeal, or final adjudication in this action" (R. 10). The motion for a new trial was denied on April 5 (R. 13), and, on April 12, petitioner filed a notice of appeal from his March 24 conviction and a motion for bail pending appeal (R. 15–16). The district

208-149—66

court denied the motion for bail on the ground that the April 12 notice of appeal was untimely under Rule 37(a)(2), Fed. R. Crim. P., since it was not filed within ten days after judgment or within ten days of the denial of a timely motion under Rule 33 or 34 (R. 18–19). The court of appeals, treating petitioner's petition for mandamus (R. 28–29) as an application for bail pending appeal, overruled the petition and dismissed the appeal as untimely on the same ground relied upon by the district court (R. 34–35). This Court granted certiorari on October 25, 1965 (R. 36; 382 U.S. 890).

The only question raised by petitioner in this Court and the courts below, and the only issue passed on by the lower courts, was whether petitioner's untimely motion for new trial, made nine days after judgment, enlarged the period for filing a notice of appeal under Rule 37(a)(2). In preparing our brief on the merits in this case, however, we discovered in the record (which was not sent up from the district court until after certiorari had been granted) petitioner's motion of April 2 for bail "pending a final determination, an appeal, or final adjudication in this action" (R. 10). This paper had apparently been overlooked by counsel and the courts below in considering the issue of timeliness. If this document, filed within ten days after judgment, is construed as a notice of appeal, petitioner is entitled to prosecute his appeal in the court below whether or not his untimely motion for a new trial enlarged the time for noticing an appeal.

The courts of appeals have been liberal in accepting as sufficient notices of appeal documents which, though technically defective, manifest an intent to appeal. See, *e.g.*, *Newsom* v. *Peyton*, 341 F. 2d 904 (C.A. 4) (letter); *United States* v. *Duncan*, 310 F. 2d 367 (C.A. 7), certiorari denied, 373 U.S. 938 (same); *Riffle* v. *United States*, 299 F. 2d 802 (C.A. 5) (same); *Poe* v. *Gladden*, 287 F. 2d 249, 251 (C.A. 9) (application for certificate of probable cause). Although most of the cases have involved indigent defendants acting without counsel, a similar approach is reflected in several cases involving deficient "notices" filed by counsel. Particularly relevant here is *O'Neal* v. *United States*, 272 F. 2d 412 (C.A. 5) (appeal bond filed by counsel). See also *Tillman* v. *United States*, 268 F. 2d 422 (C.A. 5) (motion for leave to appeal *in forma pauperis* filed by counsel); *Blunt* v. *United States*, 244 F. 2d 355 (C.A.D.C.) (same); *Sica* v. *United States*, 325 F. 2d 831 (C.A. 9), certiorari denied, 376 U.S. 952 (document filed by counsel failing to state expressly that appeal is being taken).

The precept that documents evincing an intent to appeal should be liberally construed to meet the notice requirement of the Federal Rules would seem applicable here. It cannot be said, however, that the question whether petitioner's "Motion for Bond" is a sufficient notice of appeal—a question not considered by the court below—is so well settled as to be entirely free from doubt. In these circumstances, we believe it

would be appropriate to remand the cause to the court of appeals for expeditious consideration of this issue. Cf. *United States* v. *Malphurs,* 316 U.S. 1; *Bates* v. *United States,* 323 U.S. 15, 17; *Manufacturers' Finance Co.* v. *McKey,* 294 U.S. 442, 453–454. This motion is being filed in order to bring the matter to the Court's attention so that the Court will have an opportunity to pass upon our suggestion in advance of oral argument. If the Court should prefer to hear argument of the cause, we shall file a brief on the merits discussing the issue noted above as well as the issue presented by the petition.

For the reasons stated above, we move this Court to vacate the order entered in this action by the United States Court of Appeals for the Sixth Circuit and to remand the cause to that court for expeditious consideration of the question whether the "Motion for Bond" filed by petitioner on April 2, 1965, constitutes a sufficient notice of appeal.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

FEBRUARY 1966.

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